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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

No. [illegible] 11

ALMA MOTOR COMPANY, *Petitioner*,

v.

THE TIMKEN-DETROIT AXLE COMPANY, *Respondent*.

## RESPONDENT'S BRIEF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1944.

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No. 806.

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ALMA MOTOR COMPANY, *Petitioner*,

v.

THE TIMKEN-DETROIT AXLE COMPANY, *Respondent*.

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## BRIEF FOR RESPONDENT.

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### 1. OPINIONS BELOW.

This case comes before this Court by reason of the granting of a writ of certiorari to review a decision, as amended on denial of rehearing, of the Third Circuit Court of Appeals in the case of *Alma Motor Company, appellant* v. *The Timken-Detroit Axle Company, appellee,* and the United States of America, Intervenor (R. 112-120 and 129 and 130) reported at 144 F. (2d) 714, which case was an appeal from a decision of the District Court of Delaware in a declaratory judgment action entitled *The Timken-Detroit Axle Company, Plaintiff* v. *Alma Motor Company, Defendant* (R. 33-51) reported at 47 Fed. Sup. 582.

## 2. JURISDICTION.

This is a suit arising under the Declaratory Judgment Act, Judicial Code, Sec. 274-d (28 U. S. C. 400) (R. 2, 8), diversity of citizenship, Judicial Code, Sec. 24 (Par. 1) (28 U. S. C. 41, Par. 1) (R. 2) and under the patent laws of the United States, Judicial Code Sec. 24 (Pars. 1 and 7) (28 U. S. C. 41, Pars. 1 and 7) (R. 8).

The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347).

The date of the judgment which petitioner seeks to have reviewed is August 7, 1944 as amended October 2, 1944 (R. 112-120, 129 and 130).

The writ of certiorari was granted by this Court February 5, 1945 (R. 132).

## 3. SUPPLEMENT TO STATEMENT OF THE CASE.

Petitioner's statement of this case is correct as far as it goes. However, certain facts, deemed essential by respondent are not clearly stated therein. These facts are:

In its bill for declaratory judgment, respondent asserted that the subject matter of patent No. 2,173,044 involved no invention in view of certain prior public uses of the United States Government of military trucks, having transfer cases, similar to those of patent No. 2,173,044, at Camp Holabird and for many other reasons (R. 6-7). These military vehicles were produced in accordance with specifications and plans of army engineers, and at the hearing before the Administrative Board, that ruled that no royalties should be paid under said patent No. 2,173,044, respondent urged that patentable aspects of the alleged invention, if any, were originated by Government engineers (R. 64).

Judge Kirkpatrick expressly refused to pass on the validity of patent No. 2,173,044 on September 23, 1944, and thus on the issue of originality of the invention, if any, in Camp Holabird engineers or in the prior art because he held respondent estopped to attack the validity of the pat-

ent on the ground of lack of invention in view of its license (R. 34).

The approval of Public Law 768 (R. 56-59) on October 31, 1942 occurred before judgment was entered in the declaratory judgment suit on December 2, 1942, and on December 30, 1942 the Chief of Ordnance issued notice under said law to respondent that no further royalties should be paid in excess of that to be specified in a subsequent order. Timken's right of appeal existed when said law and notice made moot the issues of the declaratory judgment suit, and Timken did not and could not in good faith appeal to the Circuit Court of Appeals from so much of the judgment of December 2, 1942 as was adverse to it and then assert that Public Law 768 made the issues in suit moot. However, petitioner, with notice that royalties would be fixed under Public Law 768, appealed on February 27, 1943, and that respondent was under order of the Government, made pursuant to said law, to pay no further royalties beyond those to be set in a subsequent order.

The latter order was issued on July 28, 1943 by the War Department. It concerned only royalties which "are directly or indirectly charged or chargeable to the War Department for or on account of the manufacture, use, sale or other disposition for the United States" (R. 93, 94), or, stated otherwise, royalties which accrued to petitioner under its agreement only because of Government use of transfer cases in military equipment required for war purposes.

The amount of these accrued royalties was not reduced to judgment by the District Court's judgment (par. 6, R. 50 and 51), which was a mere declaration of the rights of the parties. The time for appeal from this declaratory judgment expired March 2, 1943, the notice that the royalties to be paid to Alma were to be set by the War Department was given to both Timken and Alma on December 30, 1942 (R. 93), the time provided in the judgment for appointment of a master to reduce the declaration of rights to a

final and certain sum of money expired December 31, 1942 (R. 50), and War Department Order W-3 providing that no royalties were to be paid to Alma was dated and became effective July 28, 1943 (R. 93).

## 4. SUMMARY OF ARGUMENT.

Point I. Public Law 768 is purely a war measure and should be considered as such and does not constitute a "taking" of property.

Public Law 768, Sec. 7 (R. 56 to 59).
*Bowles* v. *Willingham*, 321 U. S. 503.

Point II. Public Law 768 expressly provides the due process of law required by the Constitution, and the fact that a hearing by an administrative board prior to Court action and the substitution of a special court instead of the usual Federal Courts as provided for is immaterial.

Public Law 768, Secs. 1 and 2 (R. 56, 57).
*Crozier* v. *Krupp*, 224 U. S. 307.
*Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331.
*United States* v. *Cohen Grocery Co.*, 255 U. S. 81.
*Yakus* v. *United States*, 321 U. S. 414.

Point III. Congress had the constitutional power to enact Public Law 768 as a war measure.

*Norman* v. *Baltimore and Ohio R. Co.*, 294 U. S. 240.
*Hirabayashi* v. *United States*, 320 U. S. 81, 93.
*Yakus* v. *United States*, 321 U. S. 414.
*Bowles* v. *Willingham*, 321 U. S. 503.

Point IV. The Constitution does not require the notice and hearing provided by Sec. 1 of Public Law 768 and no violation of due process can be properly based on alleged defects in the notice or in the scope of the hearing.

Public Law 768, Secs. 1 and 2 (R. 56, 57).
*Ochoa* v. *Hernandez y Morales*, 230 U. S. 139.

**Point V. Petitioner is not a judgment creditor and the District Court judgment does not finally dispose of the question of amount of royalty so as to warrant petitioner's claim of a vested right in any portion of the royalties held to have been payable.**

Public Law 768 (R. 56 to 59).
Order W-3 (R. 87, 88).
Bouvier's Law Dictionary, Rawles 3rd Revision, Vol 1, Page 726.
*Chalmers* v. *Surprise*, 70 Ind. A. 646, 123 N. E. 841, 844.
*MacKenzie* v. *U. S.*, 109 F. (2d) 540.
*Downs* v. *Blount*, 170 Fed. 15 (C. C. A. 5) cer. den. 226 U. S. 609.

## 5. ARGUMENT.

**Point I. Public Law 768 is purely a war measure and should be considered only as such.**

The title of the Act known as Public Law 768 is "To provide for adjusting royalties for the use of inventions for the benefit of the United States, in aid of the prosecution of the war and for other purposes." At the outset of the enacting portion of the Act, the purpose is stated to be to aid in the successful prosecution of the war. Sec. 2 provides that conditions of war-time production shall be taken into account by the Court of Claims in determining what royalties shall constitute fair and just compensation. Sec. 7 provides, in effect, that the Act shall remain in force only during the continuance of the present war and for six months after its termination.

It thus seems very clear that the Act is a war measure. We therefore respectfully suggest that all arguments respecting the constitutionality of said Act, that overlook or disregard the fact that the law is a war measure, are irrelevant.

The constitutional question presented by this case, as respondent sees it, is thus of quite narrow scope. Peti-

tioner has gone far afield in its attack on the constitutionality of the Act, perhaps because, as we see it, the Circuit Court of Appeals unnecessarily went beyond a holding that the Act was a proper exercise of the war powers of Congress and discussed the power of eminent domain. For under the decision of this Honorable Court in *Bowles* v. *Willingham*, 321 U. S. 503, it was held with respect to the fixing of rates of rent which are closely analogous to royalties that (P. 634):

> "We are not dealing here with a situation that involves a 'taking' of property."

We suggest that the force, if any, in petitioner's contentions is due to its attacks on implications by the Court of Appeals for the Third Circuit in its decision that the Act under consideration is valid on grounds other than purely as a war measure. On its face it is merely a war act. We believe that the points that petitioner raises, that overlook or disregard the true purpose of the Act as a war measure, to adjust the costs of the war effort and prevent unreasonable and inequitable enrichment of an individual at the expense of a War burdened public, merit no serious consideration by respondent in this brief because, as we see it, they are irrelevant. Surely the question of whether an Act paralleling Public Law 768, but enacted for a purpose other than to aid in the successful prosecution of the war, is a moot question in this case.

We suggest that it is of utmost significance that petitioner substantially disregards the fact, in all its contentions and assertions, that Public Law 768 is a war measure. The Court of Appeals properly sustained its validity as such.

**Point II. Public Law 768 expressly provides the due process of law required by the Constitution.**

Sec. 2 of Public Law 768 provides that any licensor aggrieved by any order issued pursuant to section 1 of the Act may institute suit against the United States in the

Court of Claims. We submit that the right to sue the United States, thus accorded, constitutes due process under the Fifth Amendment to the Constitution. For similar provisions in earlier laws permitting claimants, claiming compensation for the use of patented inventions by the United States, to sue in the Court of Claims, were held not to deprive the patentees, or those standing in their place, of constitutional rights in *Crozier* v. *Krupp*, 224 U. S. 307; and *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331.

Accordingly, conceding that the existence of a state of war does not suspend the operation of the Fifth Amendment, nor relieve Congress of the limitations imposed thereby, as was held by this Court in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, it seems clear that in the present case there has been no denial of due process under said amendment.

Petitioner complains that he has been relegated to another Court after jurisdiction of this case had been acquired by Courts established under the Constitution. So was complainant in *Crozier* v. *Krupp*, 224 U. S. 307. No denial of due process is involved in such relegation, if any such denial can properly be said to result from the operation of Public Law 768.

We suggest that petitioner is in error in insistently attributing the dismissal of his appeal by the Circuit Court of Appeals to Royalty Adjustment Order No. W-3, issued, as asserted, by an administrative board of the executive department. For it is the Act itself, regularly passed by the Congress of the United States and approved by the President, which has had the effect incorrectly attributed to Order W-3, Sec. 1 of the Act providing:

> "The licensor shall not have any remedy by way of suit, set-off, or other legal action against the licensee for the payment of any additional royalty remaining unpaid, or damages for breach of contract, or otherwise, but such licensor's sole and exclusive remedy,

except as to the recovery of royalties fixed in said order, shall be as provided in Section 2 hereof".

Section 2 provides that suit by any licensor aggrieved by an Order, such as W-3, may be instituted

"* * * against the United States in the Court of Claims, or in the District Courts of the United States insofar as such Courts may have concurrent jurisdiction with the Court of Claims, * * *".

Furthermore we submit that it is settled by *Yakus* v. *United States*, 321 U. S. 414, that the restriction of judicial review of an administrative determination to a single special court does not offend against due process. And in any event there is no merit at all in petitioner's contention that hearing must precede the taking in due process. For as also held by this Court in *Yakus* v. *United States*, 321 U. S. 414 when justified by compelling public interest the legislature may authorize summary action by an administrative agency, subject to later judicial review of its validity.

We accordingly can see no substantial basis for petitioner's assertions that there has been a denial of due process regardless of the fact that the Act is a war measure.

**Point III. Congress had the constitutional power to enact Public Law 768 as a war measure.**

The Court of Appeals held that the subject matter of Public Law 768 is clearly within the war powers of Congress, because the purpose of the Act is to secure the necessary materials to wage war at reasonable prices. It is significant, we again suggest, that petitioner's criticisms of the decision of the Court of Appeals are not directed against the holding of said Court that the Act is constitutional under the war powers. Yet any right to royalties touched by the Act arises directly out of the war. The royalties in this case reached large sums only because of

the gigantic need for materials to fight the war. This need is the creature of the war. The Act is thus entirely concerned with royalties which, but for the war, no one would or could have claimed to be due him. With these considerations in mind, the character of the Act as a true war measure and the lack of any claim of an appropriation or taking of a right having a peace time value becomes very apparent.

In this case the royalties claimed by petitioner were a windfall to it created by the war. Petitioner, in effect, asserts a vested right to swollen war royalties under a contract, made in times of peace by parties who contemplated only a small peace time production. We suggest that petitioner's assertions are tantamount to a claim that it has a constitutional right to reap large royalty returns arising directly out of the war, or at a time when great sacrifices are asked, and even legally required, of all. Surely an Act of Congress directed against windfalls of the character here involved constitutes only a reasonable protection of the public interest rather than, as petitioner asserts, a taking of vested property without due process of law.

The contract rights claimed by petitioner to have been appropriated are of the nature of those asserted by complainant in *Norman* v. *Baltimore and Ohio R. Co.*, 294 U. S. 240, which held valid the repeal of the gold clause of a bond, which constitutes a private contract.

Petitioner's apparent contention that alleged lack of necessity of the taking of the money involved renders the Act and the order unconstitutional even under the war power is wholly without merit. As this Court said in *Hirabayashi* v. *United States*, 320 U. S. 93:

> "The war power of the national government is 'the power to wage war successfully.' See Charles Evans Hughes, War Powers Under the Constitution, 42 ABA Rep. 232, 238. It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the win-

ning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war. Prize Cases, 2 Black (U. S.) 635, 17 L ed. 459, supra; Miller v. United States (Page v. United States, 11 Wall. (U. S.) 268, 303-314, 20 L ed. 135, 143-147; Stewart v. Kahn (Stewart v. Bloom), 11 Wall. (U. S.) 493, 506, 507, 20 L ed. 176, 179; Selective Draft Law Cases (Arver v. United States), 245 U. S. 366, 62 L ed. 352, 38 S. Ct. 159, LRA 1918C 361, Ann. Cas. 1918B 856; McKinley v. United States, 249 U. S. 397, 63 L ed. 668, 39 S. Ct. 324; United States v. Macintosh, 283 U. S. 605, 622, 623, 75 L ed. 1302, 1309, 1310, 51 S. Ct. 570. Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. Ex parte Quirin, supra (317 U. S. 28, 29, ante, 12, 13, 63 S. Ct. 2); cf. Prize Cases, supra (2 Black (U. S.) 670, 17 L ed. 477); Martin v. Mott, 12 Wheat. (U. S.) 19, 26, 6 L ed. 537, 540. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs."

The war powers of Congress are exhaustively discussed by this Court in *Hirabayashi* v. *United States*, 320 U. S. 81, *Bowles* v. *Willingham*, 321 U. S. 503, and *Yakus* v. *United States*, 321 U. S. 414, referred to by the Court of Appeals in sustaining Public Law 768 as a war measure. As we see it, the Act is so clearly within the war powers of Congress as outlined in the latter cases, that further discussion by respondent appears superfluous.

**Point IV. The Constitution does not require the notice and hearing provided by Sec. 1 of Public Law 768 and no violation of due process can be properly based on alleged defects in the notice or in the scope of the hearing.**

Respondent suggests that, since Sec. 2 of Public Law 768 specifically provides a procedure under which petitioner can secure just compensation in the Court of Claims in which due legal process is followed in the adjudication of a claimant's rights, the provision in Sec. 1 of said Law for a preliminary notice and hearing was in no correct legal sense necessary to the validity of the Law under the Constitution.

Due process as applied to property rights inhibits the taking of property contrary to settled usages and modes of procedure and without notice and opportunity for a hearing (*Ochoa* v. *Hernandez y Morales*, 230 U. S. 139). Surely proceedings in the Court of Claims follow settled usages and modes of procedure, and Public Law 768 thus provides for due process in securing just compensation.

Such being the case, the provisions for notice and for hearing in Sec. 1 of the Act cannot be correctly said to have been necessary in order that said Act be constitutional. The notice and hearing under Sec. 1 provided an opportunity for an amicable adjustment between the Government and petitioner. Whatever the outcome of proceedings under Sec. 1 of the Act, petitioner could not be, and was not, deprived of its rights under Sec. 2 of the Act.

We suggest therefore that the Court of Appeals correctly found that the hearing provided by Sec. 1 of the Act was not constitutionally required. Such being the case it is difficult to see any substantial basis for any contention that constitutional rights were invaded by proceedings at, or leading up to, a hearing that was not even constitutionally required to be held.

Respondent does not mean to imply by what has just been said that it believes that anything transpired at the hearing, or that the notice thereof was defective, if the hearing before the Administrative Board had been such as

required to protect the property rights of petitioner under the Constitution. It conceives petitioner's objections to be legally without substantial basis.

**Point V. Petitioner is not a judgment creditor and the District Court judgment does not finally dispose of the question of amount of royalty so as to warrant petitioner's claim of a vested right in any portion of the royalties held to have been payable.**

Due to the nature of the judgment entered by the District Court, see particularly paragraph 6 of the judgment (R. 50, 51) it is clear that the judgment entered December 2, 1942 was merely declaratory and interlocutory and left for future determination the amount of royalty to be paid. Before the determination of the amount of royalty to be paid to petitioner was made and before the period of appeal from the District Court judgment had expired, Public Law 768 was made applicable to the controversy by the notice of December 30, 1942 (R. 53, 106). It follows, therefore, that the public interest, which respondent from the inception of this litigation urged as a superior equity to personal estoppel by agreement, was by Congressional edict made the determining factor on the question of petitioner's contractual rights and of the quantum of petitioner's prospective compensation. Petitioner, accordingly, had never reached the status of a judgment creditor, a status requiring a final judgment for a sum certain capable of execution, see Bouvier's Law Dictionary, Rawles 3rd Revision, Vol., page 726, *Chalmers* v. *Surprise*, 70 Ind. A. 646, 123 N. E. 841, 844 and *MacKenzie* v. *U. S.*, 109 F. (2d) 540, nor had petitioner acquired a vested right to any portion of the royalties involved here, that is, "some right or interest in property that has become fixed and established and is no longer open to doubt or controversy" (see *Downs* v. *Blount*, 170 Fed. 15 (C. C. A. 5), cer. den. 226 U. S. 609), at the time Public Law 768 became effective in this matter.

Accordingly, even if the question of whether petitioner was a judgment creditor or held a vested interest in even a portion of the royalties held to be payable by the District Court judgment were pertinent to a consideration of the constitutionality of Congressional war powers as incorporated in Public Law 768, petitioner is not and never has been in a position to urge these points. For, at the time Public Law 768 became applicable to this controversy and made it moot, the appeal limit had not expired, the quantum of damage had not been determined and no part of the District Court's judgment had even become final so as to entitle petitioner to execution on the judgment. Respondent's failure to file a useless appeal on issues made moot by application of Public Law 768 certainly vested no rights in petitioner.

## 6. CONCLUSION.

For the above reasons respondent respectfully submits that the Court of Appeals correctly disposed of this case on its motion to dismiss petitioner's appeal; that if error there be in the decision of the Court of Appeals it is only in certain immaterial reasons given for its action; and that the Court of Appeals amply justified its disposition of the case aside from said immaterial reasons.

An affirmance of the action of the Court of Appeals in dismissing petitioner's appeal is accordingly asked and it is respectfully requested that the Court of Appeals be instructed to enter a mandate vacating the District Court's judgment and dismissing the action on the ground that Public Law 768 renders the issues moot.

Respectfully submitted,

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